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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 29, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KURT JEFFREY ANGELONE,

Plaintiff,

v.

AARON BROWN, DANIEL JONES,
KERRY DEYOUNG, LEONA
CHAPMAN, DAWSON BRICKEY,
ALEX ROCKSTROM, ZACHARY
ESPINOZA, JONATHAN
MARTINEZ, and STEVEN NIELSEN,

Defendants.

NO: 2:24-CV-096-TOR

ORDER DISMISSING ACTION

BEFORE THE COURT is Plaintiff Kurt Jeffrey Angelone's First Amended Complaint. ECF No. 50. Plaintiff seeks monetary damages for alleged Eighth Amendment violations and state law claims of negligence, breach of duty of care, medical negligence, and intentional tort. *Id.* at 6–13. Plaintiff, a prisoner currently housed at the Airway Heights Corrections Center, is proceeding *pro se* and *in form pauperis*. ECF No. 21. Defendants have not been served.

1 The Court has directed the Clerk of Court to sever the claims of Co-Plaintiffs
2 John Griffin Headrick and Adam Persell and directed that they each proceed in their
3 individual actions. ECF No. 56.

4 As a general rule, an amended complaint supersedes the original complaint
5 and renders it without legal effect. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th
6 Cir. 2012). Therefore, “[a]ll causes of action alleged in an original complaint which
7 are not alleged in an amended complaint are waived.” *King v. Atiyeh*, 814 F.2d 565,
8 567 (9th Cir. 1987) (citing *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th
9 Cir. 1981)), *overruled in part by Lacey*, 693 F.3d at 928 (any claims voluntarily
10 dismissed are considered to be waived if not replied).

11 Furthermore, defendants not named in an amended complaint are no longer
12 defendants in the action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.
13 1992). Therefore, Defendants Washington State Department of Corrections,
14 Superintendent Ronald Haynes, AHCC, Lance Hall, Sgt. D. Young, Sgt. McKinney,
15 Jane and John Doe Correctional Officers and Personnel have been terminated from
16 this action and Defendants Kerry DeYoung, Leona Chapman, Dawson Brickey,
17 Alex Rockstrom, Zachary Espinoza, Jonathan Martinez and Steven Nielsen were
18 added. The Court notes Plaintiff did not properly number his complaint, labeling
19 page “2” twice.

20 Liberally construing the entirety of the First Amended Complaint in the light

1 most favorable to Plaintiff, the Court finds that he has failed to state a claim upon
2 which this Court can grant him relief.

3 **PLAINTIFF'S ALLEGATIONS**

4 Plaintiff accuses First Shift Commander Lieutenant Aaron Brown of using
5 excessive force in violation of the Eighth Amendment. ECF No. 50 at 6. He also
6 accuses Defendant Brown of being deliberately indifferent to his serious medical
7 needs. *Id.* at 9–10.

8 Plaintiff states that on February 15, 2023, Defendant Brown conducted an
9 unauthorized training exercise with (CS) tear gas obtained without authorization
10 from the prison armory, and without a certified instructor. *Id.* at 6–7. Defendant
11 Brown released a CS gas grenade near the unit where Plaintiff was housed, exposing
12 prisoners to the gas via the HVAC system. *Id.* at 7.

13 Plaintiff states that he was awakened from a sound sleep and immediately
14 experienced, “burning.” *Id.* Plaintiff states that he suffers from COPD¹ and since
15 the “gas attack” he has been diagnosed with asthma for which he was given “another
16 type of inhaler.” *Id.* Plaintiff claims he also suffers from inflammation in his lungs,
17 and “serious breathing issues since the gas exposure.” *Id.* Plaintiff states that he has
18 developed airway and pulmonary edema, and because he can no longer breathe as

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¹Presumably Chronic Obstructive Pulmonary Disease

1 he once did, he is unable to “walk normally.” *Id.* at 8.

2 Plaintiff avers the exposure was “intense and lasted for several hours even
3 after Aaron Brown shut off the vents, nevertheless the air with the gas was blowing
4 through this vent with strong force for 30 minutes straight.” *Id.* at 8. Plaintiff states
5 he suffered “severe burning of both eyes[,]” “copious tearing,” “extreme burning in
6 the nose,” “severe burning in the throat and lungs, coughing, consciousness of the
7 excruciating pain, breathing little, heartrate slowing down, blood pressure rising,”
8 “mucus secretion, nausea and vomiting and panic.” *Id.* Plaintiff states that he
9 pleaded with Defendant Brown to let him declare a medical emergency and was
10 twice denied. *Id.* He asserts that Defendant Brown falsely asserted it was an
11 electrical fire. *Id.*

12 The Eighth Amendment's prohibition of cruel and unusual punishment
13 imposes duties on prison officials to provide prisoners with the basic necessities of
14 life such as food, clothing, shelter, sanitation, medical care and personal safety. *See*
15 *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Helling v. McKinney*, 509 U.S. 25,
16 31 (1993). To state a claim for unconstitutional conditions of confinement, a
17 prisoner must allege that a Defendant's acts or omissions deprived the prisoner of
18 “the minimal civilized measure of life's necessities” and that the Defendant acted
19 with deliberate indifference to an excessive risk to inmate health or safety. *See*
20 *Farmer*, 511 U.S. at 834.

1 Plaintiff has alleged no facts in Count I from which the Court could infer that
2 Defendant Brown was deliberately indifferent to the risk of CS gas exposure. While
3 Plaintiff later asserts that “[D]efendant Brown was purposely going to expose the
4 prisoners to CS gas via HVAC system,” and that eight other Defendants failed to
5 intervene, ECF No. 50 at 11, his attached exhibits contradict that any exposure was
6 intentional. Based on Plaintiff’s exhibits, Aaron Brown attested to the truth and
7 accuracy of the following statement he made on March 23, 2023: “When the CS
8 accidentally made it to the unit, my chest sunk.” *Id.* at 20.

9 Aaron Brown further attested, “I did not notify medical because I personally
10 checked on any I/I awake. They all said they were ok other than a slight burning. If
11 one of them had claimed a medical emergency or emergency grievance then I would
12 of contacted medical.” *Id.* In an additional attestation dated March 22, 2023, Aaron
13 Brown stated, “Most all the I/I’s that complained of burning eyes and smoke had
14 gone back to sleep, by the time I had left the unit.” *Id.* at 24.

15 Yet another attestation dated March 20, 2023, by a person with the initials
16 “SL” and an unclear signature, states that incarcerated individuals were experiencing
17 a “[l]ittle coughing and the complaining of what the smell was. There was one
18 comment that we gassed them. We did not tell them what it was that they smelled
19 . . . One guy, I think in a corner cell kept complaining and wanted to be let out, but
20 he was not let out. We did talk with him, and he appeared fine. We did tier checks

1 and talked with anyone that was awake and affected. Before we left the unit, most
2 all I/I's had their lights back off and went back to bed. I did mention to the
3 Lieutenant that he should alert someone asap of this situation." *Id.* at 30.

4 When exhibits are attached to a complaint, the exhibits are deemed part of the
5 complaint for all purposes, including for purposes of determining the sufficiency of
6 the claims. *See Fed.R.Civ.P. 10(c); 5A Wright & Miller, Federal Practice and*
7 *Procedure: Civil 3d § 1327, at 443–44 (2002).* If an exhibit attached to a complaint
8 contradicts an assertion in the complaint and reveals information that prohibits
9 recovery as a matter of law, the information provided in the exhibit trumps the
10 allegation in the complaint. *Wilson v. Fitter*, 2009 WL 6908049, at *2 (C.D. Cal.
11 Nov. 5, 2009) *report and recommendation adopted*, 2010 WL 3893992 (C.D. Cal.
12 Sept. 30, 2010) (citing *Riggins v. Walter*, 279 F.3d 422, 425–26 (7th Cir. 1995)
13 (affirming dismissal of prisoner's § 1983 claims where information in attached
14 exhibit contradicted allegation of complaint); *Hudson v. Phillipson*, 2008 WL
15 356884, *3 (W.D. Mich. Feb. 7, 2008) (dismissing prisoner's § 1983 claims where
16 information in attached exhibits conflicted with allegations of complaint)).

17 Here, the attached attestation of an accident does not support an Eighth
18 Amendment claim that Defendant Brown acted with deliberate indifference to
19 Plaintiff's safety when deploying the tear gas. While Defendant Brown may have
20 acted negligently or in violation of DOC policy, such claims do not state a

1 constitutional violation. *See Davidson v. Cannon*, 474 U.S. 344, 347–48 (1986)
2 (Negligence is not actionable in an action pursuant to 42 U.S.C. § 1983); *Cousins*
3 *v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009) (The failure to follow prison policy
4 does not establish a constitutional violation). Without an underlying constitutional
5 violation, Plaintiff's allegations that eight additional Defendants failed to intervene
6 to prevent the deployment of the tear gas will not support a claim to relief.

7 Furthermore, Plaintiff's assertion that he was refused emergency medical
8 treatment is contradicted by the attestation of Defendant Brown that, "If one of them
9 had claimed a medical emergency or emergency grievance then I would of contacted
10 medical." ECF No. 50 at 20 (as written in original). Because this attestation trumps
11 the allegation in the complaint, the Court cannot infer deliberate indifference on the
12 part of Defendant Brown to Plaintiff's serious medical needs. Plaintiff admits he
13 has received continuing medical treatment, including an inhaler. As presented,
14 Plaintiff has failed to state an Eighth Amendment claim upon which this Court can
15 grant relief.

16 Under the circumstances of this case, the Court finds that further amendment
17 would be unavailing. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d
18 1034, 1041 (9th Cir. 2011). In the absence of a viable federal constitutional claim,
19 the Court will decline to exercise supplemental jurisdiction over Plaintiff's state law
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1 claims. *See* 28 U.S.C. § 1337(c)(3). Nevertheless, the Court will dismiss this action
2 without prejudice to Plaintiff pursuing those claims in the appropriate forum.

3 **ACCORDINGLY, IT IS ORDERED:**

- 4 1. The First Amended Complaint, ECF No. 50, is **DISMISSED without**
5 **prejudice** to Plaintiff pursuing his state law claims in the appropriate forum.
6 2. This dismissal will not count as a dismissal under 28 U.S.C. § 1915(g). *See*
7 *Harris v. Harris*, 935 F.3d 670 (9th Cir. 2019).
8 3. Plaintiff's *in forma pauperis* status is hereby **REVOKED**.
9 4. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal of this
10 Order would not be taken in good faith and would lack any arguable basis in
11 law or fact.

12 The Clerk of Court is directed to enter this Order and Judgment accordingly,
13 provide copies to Plaintiff, and **CLOSE** the file.

14 **DATED** October 29, 2024.



15 A handwritten signature in blue ink that reads "Thomas O. Rice".
16 THOMAS O. RICE
17 United States District Judge
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